78

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No. 07-881

IN THE SUPREME COURT
OF THE UNITED STATES

LESLIE ANN MELTON
f/k/a LESLIE ANN FREDMAN,
Petitioner,

and

DAVID LYNN FREDMAN,
Respondent.
/

PETITION FOR WRIT OF CERTIORARI

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of Florida, Second District

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QUESTIONS PRESENTED

1. **Absent demonstrated harm to the child, is the "best interest of the child" sufficient to serve as a compelling state interest to deprive a parent of his/her constitutional rights?**
2. **What is the proper legal standard to be applied when a court must determine if a child should be permitted to relocate to another state with their already established primary caregiver -- "best interest of the child" or "detriment to the child"?**
3. **Is it an abuse of a state's parens patriae power to restrict a parent from establishing their home for their child(ren) in another state when that parent has previously been awarded primary residential custody, either by court order or agreement, and has not subsequently been found to be unfit to retain their primary custodial status?**
4. **Is it a violation of a primary custodial parent's constitutionally protected rights to geographically restrict where he/she may establish their home, by court order, based solely on their custodial status?**

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 6

I. THE DECISION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT, IN FREDMAN V. FREDMAN, 960 SO. 2D 52 (FLA. 2D DCA 2007) CONFLICTS WITH THE DECISIONS OF OTHER STATE SUPREME COURTS OF THE UNITED STATES ON THE SAME IMPORTANT MATTER. 6

II. FLORIDA'S PARENTAL RELOCATION STATUTE, FLA. STAT. § 61.13(2)(D), IS UNCONSTITUTIONAL. 13

CONCLUSION 27

INDEX TO APPENDICES

APPENDIX A	Decision of State District Court of Appeals
APPENDIX B	Decision of State Trial Court
APPENDIX C	Decision of State Trial Court on Remand
APPENDIX D	Decision of State Supreme Court Denying Review and Denying Motion for Rehearing

APPENDIX E **Fla. Stat. § 61.13(2)(d), (2004)**

APPENDIX F **Fla. Stat. § 61.13001(7) & (8), (2006)**

TABLE OF AUTHORITIES CITED

Cases

D'Onofrio v. D'Onofrio,
365 A.2d 27, 29 (N.J. Super 1986) 21

Dunn v. Blumstein,
405 U.S. 330, 339 (1972) 19

Fredman v. Fredman,
917 So. 2d 1038 (Fla. 2d DCA 2006)..... 4

Fredman v. Fredman,
960 So. 2d 52 (Fla. 2d DCA 2007).....passim

Gilbert v. Gilbert,
730 N.W.2d 833 (N.D. 2007)..... 10

In re Marriage of Pape,
989 P.2d 1120, 1128 (Wash.2000) 22

In re T.W.,
551 So. 2d 1186, 1192 (Fla. 1989) 15

In re: Marriage of Ciesluk,
113 P.3d 135 (Colo. 2005) 9, 19

Jaramillo v. Jaramillo,
823 P.2d 299, 306 (N.M. 1991)..... 19

Jones v. Helms,
452 U.S. 412, 417-18 (1981)..... 17

Kaiser v. Kaiser,
23 P.3d 278, 35 (Okla. 2001)..... 21

Lane v. Shenck,
614 A2d 786, 789 (Vt. 1992) 23

MacKinnon v. MacKinnon,
922 A.2d 1252 (NJ 2007) 11

Mahmoodjanloo v. Mahmoodjanloo,
160 P.3d 951 (Okla. 2007) 9, 18

Mize v. Mize,
621 So. 2d 417 (Fla. 1993) 6

Moore v. East Cleveland,
431 U. S. 494, 503 (1977) 13

Russenberger v. Russenberger,
669 So. 2d 1044 (Fla. 1996) 7

Shapiro v. Thompson,
394 U.S. 618 (1969) 17

Sherbert v. Verner,
374 U.S. 398, 406 (1963) 13

Thomas v. Collins,
323 U.S. 516, 530 (1945) 13

Winfield v. Division of Para-Mutual Wagering,
477 So.2d 544, 548 (Fla.1985) 15

Zablocki v. Redhail,
434 U.S. 374, 396 (1978) 14

Statutes

28 U. S. C. § 2403(b)..... 1

28 U.S.C. §1257(a)..... 1

Fla. Const. Art. I, § 23..... 14

Fla. Stat. § 61.13(2)(b)(1) (2007)..... 22

Fla. Stat. § 61.13(2)(b)(2)(2007)..... 20

Fla. Stat. § 61.13(2)(d)(2004) 7, 20

Fla. Stat. § 61.13001 (2006) 7

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is reported at Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007).

JURISDICTION

The date on which the highest state court decided this case was June 20, 2007. A timely petition for discretionary review by the Supreme Court of the State of Florida was thereafter denied on October 8, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a). Further, 28 U. S. C. § 2403(b) may apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At issue in this case is whether the "best interest of the child" legal standard, absent demonstrated harm, is sufficient to serve as a compelling state interest to deprive a parent of his/her constitutional rights under a state's parens patriae power.

U.S. Const. Amend. XIV, § 1;

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Const. Art. I, § 23;

Right of privacy.— Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.

Fla. Stat. § 61.13(2)(b)(2), (2007)

The court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared

parental responsibility would be detrimental to the child.

Fla. Stat. § 61.13(2)(d), (2004)

See Appendix E.

Fla. Stat. § 61.13001(7) & (8), (2006)

See Appendix F.

STATEMENT OF THE CASE

The parties in this case divorced on October 14, 2002, with the Final Judgment of Dissolution of Marriage ("Final Judgment") incorporating the July 2002 Marital Settlement Agreement ("MSA") that was entered into voluntarily by both parties. In the MSA, the parties agreed that Petitioner would be the primary residential parent of their two children (Joshua, date of birth 12-21-94, and Jared, date of birth 12-22-97). There was no provision restricting the Petitioner's relocation with the children.

On January 23, 2004, Petitioner petitioned the court to modify the Respondent's visitation to accommodate the children's relocation with her to Texas due to her upcoming marriage to Mr. Melton. Respondent objected to the relocation but did not seek primary custody of the children. Petitioner married Mr. Melton on March 25, 2004, but a temporary injunction prohibited her and the children's relocation. On December 9, 2004 the trial court entered an order denying Petitioner's relocation request, and she appealed that order. On January 27, 2006 the District Court of Appeal of the State of Florida, Second District issued Fredman v. Fredman, 917 So. 2d 1038 (Fla. 2d DCA 2006), reversing the court's ruling, finding that the trial court had "applied the wrong standard in measuring the substitute visitation schedule." Id. at 1041. On remand, the trial court was instructed to use the correct legal standard of

whether the substitute visitation was adequate to maintain a continuing meaningful relationship between the Father and children if they were allowed to relocate with their Mother. Id.

On March 23, 2006, the trial court on remand once again denied Petitioner's relocation request, finding that: (1) the substitute visitation would be adequate to foster a continuing, meaningful relationship between the children and the Father, (2) there was no evidence to suggest that Petitioner would not comply with any substitute visitation arrangements, (3) the move would be likely to improve the quality of life of Petitioner and her new husband, (4) the children's lives would be "substantially the same" in Texas as it is in Florida, (5) the Father had not petitioned the court for a change in custody, but (6) there had not been an adequate showing that the proposed relocation would improve the children's school, family or even home life, and (7) the relocation was not in the children's best interest. Petitioner once again appealed. On June 20, 2007, the District Court of Appeal of the State of Florida, Second District issued Fredman v. Fredman, 960 So. 2D 52 (Fla. 2D DCA 2007) affirming the trial court's ruling on remand. (See Petitioner's Appendix A.) Petitioner subsequently appealed to the Supreme Court of the State of Florida, and discretionary review was denied on October 8, 2007.

REASONS FOR GRANTING THE PETITION

I. The Decision Of The District Court Of Appeal Of The State Of Florida, Second District, In Fredman V. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007) Conflicts With The Decisions Of other state supreme courts of the United States On The Same Important Matter.

The decision of the District Court of Appeal of the State of Florida, Second District, in Fredman v. Fredman, 960 So. 2D 52 (Fla. 2D DCA 2007) expressly and directly conflicts with other state supreme courts of the United States who have recently addressed the sensitive and constitutionally charged issue of parental relocation. The issue of parental relocation and the vast difference in how this issue is currently being addressed by the State of Florida as compared to other states is a matter of great public importance that demands this honorable Court's attention and guidance. A lack of clear and constitutionally sound guidance as to how much control a State can exert over a primary residential parent when they seek to relocate the primary residence of a minor child has resulted in inconsistent and often unconstitutional results among courts of last resort throughout the United States.

The Florida Supreme Court has not addressed the issue of parental relocation since Mize v. Mize, 621 So. 2d 417 (Fla. 1993) and Russenberger v. Russenberger, 669 So. 2d 1044 (Fla. 1996), when the Court established a

rebuttable presumption favoring good faith relocation requests. In 1997, the Florida Legislature enacted Fla. Stat. § 61.13(2)(d)[1] eliminating the Florida Supreme Court's previously proclaimed presumption in favor of good faith relocation requests. The enactment of this legislation ultimately shifted the burden from the secondary residential parent - who had to prove under Mize and Russenberger that the requested relocation was being made in bad faith - to the primary residential parent who now had to prove: 1) the request was made in good faith; 2) the move will be likely to improve the general quality of life for both the residential parent and the child; 3) that they will comply with any substitute visitation arrangements; 4) that substitute visitation will be adequate to foster a continuing meaningful relationship between the child and the secondary residential parent; 5) that the transportation for visitation is financially affordable; and 6) that the move is in the child's best interest. This heavy burden is virtually impossible to carry, because even a primary

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[1] On October 1, 2006, Fla. Stat. § 61.13001 entitled "Parental relocation with a child" became effective. While this new relocation statute contains a more balanced approach at analyzing relocation requests, it still suffers from the same unconstitutional infirmities once the secondary residential parent properly objects to a relocation request. Section 61.13001(7), Fla. Stat. (2006) continues to give the trial court the unbridled discretion to deny a primary residential parent's relocation request because the court believes it is not in the child's best interest, without requiring a showing of ill motive or harm.

residential parent who is doing a good job in parenting his/her children (good housing, good school, good behavior, good contact with secondary residential parent) has little chance of proving all of these factors, resulting in primary residential parents in Florida being restricted to living in the secondary residential parent's home town during their children's majority.

In Fredman v. Fredman, 960 So. 2D 52 (Fla. 2D DCA 2007), the District Court of Appeal of the State of Florida, Second District affirmed the trial court's denial of the Mother's relocation based exclusively on the fact that the trial court simply did not agree that the children's relocation to Texas was in their best interest. The trial court had found no evidence to suggest that the relocation of the children to Texas would be detrimental to them. The trial court had found no evidence to suggest that the Mother was relocating to Texas out of a vindictive desire to interfere with the Father's visitation with the children. The court had found no evidence that the Mother was unfit to retain primary residential custody. The trial court specifically found that the Mother would comply with any alternate court ordered visitation arrangement, and the Father had not petitioned the court for primary custody of the children. The trial court in Fredman denied the Mother's request to relocate the children based solely on its personal opinion of "best interest", and the Second District affirmed the trial court's denial, ultimately leaving the Mother in "legal limbo" with regard to her

primary residential custody. This decision not only conflicts with the Florida Supreme Court's last published opinion on parental relocation matters, but also conflicts with many other state supreme courts across this nation.

In 2005, the Supreme Court of the State of Colorado reversed the denial of a relocation request by a primary custodial parent who sought to relocate with her son to Arizona for employment reasons. See In re: Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005). In Ciesluk, the Colorado Supreme Court held that in the absence of demonstrated harm to the child, the "best interests of the child" was insufficient to serve as a compelling state interest, depriving a parent of his/her constitutional right to travel. The decision of the district court in Fredman conflicts with the Colorado Supreme Court's holding in Ciesluk, because the Fredman court affirmed the trial court's denial of the Petitioner's relocation request based solely on best interest, without finding any demonstrated harm to the children, whereas the Colorado Supreme Court in Ciesluk believed that the best interests of the child was not sufficient to serve as a compelling state interest unless there was a showing of harm.

In Mahmoodjanloo v. Mahmoodjanloo, 160 P.3d 951 (Okla. 2007) the Oklahoma Supreme Court recently reversed a Father's denied relocation request where the Father who had primary custody of his two daughters was seeking to move to live with his spouse in New York. The Oklahoma Supreme Court

found that the Father had a good-faith reason for the proposed move (i.e., to join his spouse in another state) and was not moving from a vindictive desire to interfere with the Mother's visitation. Justice J. Opala of the Mahmoodjanloo court also noted that denying a relocation request without conducting a post-denial proceeding to adjudicate the legal consequences that flowed from its decision cast an impermissible burden on the father's previously adjudicated custodial interest. The decision of the District Court of Appeal of the State of Florida, Second District, in Fredman v. Fredman, 960 So. 2D 52 (Fla. 2D DCA 2007) conflicts with the Mahmoodjanloo court in this regard, as the Second District affirmed a trial court's order that casts an impermissible burden on the Petitioner. The State of Florida has implicitly left the Petitioner with the burden of choosing between primary residential custody of her children in Florida or her new marriage in Texas. Forcing a remarried parent to voluntarily give up primary residential custody of their children in order to exercise constitutionally protected rights, for no other reason than the court disagrees with the primary residential parent's residential choice, is clearly an impermissible burden to that parent that demands strict scrutiny by the judiciary. Yet, Florida's Second District Court of Appeal has failed to acknowledge that this impermissible burden exists.

The Supreme Court of the State of North Dakota also recently reversed a primary

custodial Mother's denied request to relocate to West Virginia to be with her new husband in Gilbert v. Gilbert, 730 N.W.2d 833 (N.D. 2007). The Gilbert court held that the trial court had erred by focusing on the lack of evidence supporting economic benefits of the proposed relocation, where the Mother was not seeking to relocate for economic reasons; she wanted to move to be with her new husband. The Gilbert court held that while North Dakota has no statutory presumption in favor of or against a request to relocate and that no one factor is dominant in evaluating whether a move to another state is in the child's best interest, when the custodial parent desires to move to live with a new spouse, that fact becomes dominant in favor of allowing the child to move to another state, particularly when there is no evidence of ill motive or that the visitation with the non-custodial parent is not likely to occur. Upon reversal the Gilbert court specifically noted that at that time they had found no cases where a custodial parent's request to move out of state to live with a new spouse was denied when the integrity of the custodial parent's motive for moving was not questioned. Like North Dakota, Florida's parental relocation statute has no statutory presumption in favor of or against a request to relocate. However, in direct conflict with North Dakota's holding under nearly identical circumstances, the court in Fredman did not find the Mother's request to relocate to Texas to live with her new spouse to be a weighing factor at all.

In MacKinnon v. MacKinnon, 922 A.2d 1252 (NJ 2007), the Supreme Court of the State of New Jersey also recently affirmed a Mother's relocation with her 7-year old daughter to Okinawa, Japan to be closer to family, decrease living expenses, and to pursue improved job opportunities. The MacKinnon court found that the Mother had a good-faith reason for the move, and that the move would not be inimical to the child's best interests. Thus, the State of New Jersey had no compelling reason to restrict the child from relocating with her primary caregiver to Japan. In sharp contrast, the Fredman court found no compelling reason to restrict the children from relocating with their primary caregiver to Texas, and denied the Mother's request based solely on the trial court's personal opinion of best interest.

The decision of the District Court of Appeal of the State of Florida, Second District, in Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007) clearly conflicts with recent decisions of other state supreme courts of the United States as to how much control a State can constitutionally exert over a primary residential parent when they seek to relocate the primary residence of a minor child. Accordingly, this Honorable Court should grant this Petition for Writ of Certiorari in order to resolve conflict that directly affects the constitutional rights of primary residential parents and to establish uniformity in parental relocation laws among the United States.

II. Florida's Parental Relocation Statute, Fla. Stat. § 61.13(2)(D), Is Unconstitutional.

The decision of the District Court of Appeal of the State of Florida, Second District, in Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007) affirming the trial court's application of Fla. Stat. § 61.13(2)(d)sets legal precedent in the State of Florida that blatantly violates the constitutional rights of all primary residential parents. Under the 14th Amendment of the Federal Constitution, a citizen can seek redress and protection for any state legislation that brings them an injury by depriving them of a civil right. Rights and privileges are secured by the fourteenth amendment by way of prohibition against state laws and state proceedings that negatively affect those rights and privileges. This Court has previously stressed the importance of the Constitutional protections afforded the institution of family in our Nation's history and tradition.

> **"[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition".**

Moore v. East Cleveland, 431 U.S. 494, 503 (1977). This Court has also stressed that "'[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation [of fundamental rights].'" (Emphasis added.) Sherbert v. Verner,

374 U.S. 398, 406 (1963) (emphasis added)(quoting Thomas v. Collins, 323 U.S. 516, 530 (1945).

The decision of the District Court of Appeal of the State of Florida, Second District, in Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007) is at odds with this Court's general policy governing decisions on family matters. The district court's decision to affirm the trial court's order prohibiting Petitioner's relocation with her children to Texas to live with her husband and stepson unavoidably creates a court ordered division of two children's primary residential family unit -- without cause -- and renders the Petitioner and the children prisoners of the State of Florida. This decision not only infringes on many of the Petitioner's constitutionally protected freedoms, but also provokes the destruction of the children's primary residential family by forcing the Petitioner to live separately from her spouse and new family, else abandon the children of whom she has previously been awarded primary residential custody. See Zablocki v. Redhail, 434 U.S. 374, 396 (1978) Powell, J. concurring) (The right of the State to regulate the institution of marriage under its police power is unquestioned where it does not infringe on fundamental rights.)

A. Florida's Parental Relocation Statute is Unconstitutional Because it Violates Primary Residential Parents' Right to Privacy.

Florida's parental relocation statute

violates primary residential parents' right to privacy, because the statute gives Florida courts the authority to scrutinize and override a primary residential parent's decision regarding where best to geographically establish their personal family home on a showing of significantly less evidence than that the child would be harmed by their decision or that their motive for relocating is questionable. In 1980, Florida amended its Constitution to secure an independent, freestanding Right to Privacy Clause which states that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life." Florida Const. Art. I, § 23. The Florida Supreme Court has since held that,

> **"...[r]ight of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means."**

Winfield v. Division of Para-Mutual Wagering, 477 So.2d 544, 548 (Fla.1985). See also In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989). A primary residential parent's fundamental interest in establishing a suitable family home

for their child and raising their child in that home while the child is under their care and control without governmental intrusion is thoroughly undermined by Florida's Relocation Statute.

The Second District held in Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007) that a primary residential parent's right to privacy is not implicated by Florida's Relocation Statute, because when the parents agree to shared parental responsibility and a court order provides for shared parental responsibility, the primary custodial parent (the Petitioner in this case) does not have a reasonable expectation of privacy to decide in what state the children live, with respect to the secondary custodial parent (the Respondant), although she would have a reasonable expectation of privacy as to a third party. (Appendix A, p. 9) Essentially, the Second District's opinion in Fredman denounces the Petitioner's right to privacy in deciding where the parties' children live while they are under her care, and upholds the Father's right to privacy in deciding where the children live while they are under his care. The constitutional infirmity of Florida's Relocation Statute asserted by the Petitioner is that the statute violates primary residential parents' right to privacy by forcing them to subject their personal decision of where to establish their home to judicial scrutiny and empowers the state to dictate where the primary residential parent may/may not live without requiring a determination by the court that the

primary residential parent is no longer fit to make primary residential decisions for their children.

This Court has ruled that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." Troxel v. Granville, 530 U.S. 57 (2000). The primary residential parent has previously been selected as the better parent to handle the day-to-day care of the child, either by agreement or court order, and is in the best position to make the determination of where they can best facilitate their day-to-day care of that child. As stated in Troxel,

> **"[T]here is a presumption that fit parents act in the best interest of the children....Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Id at 530 U.S. at 68-69.**

The provision in Florida's Relocation Statue that directs the court that "[n]o presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move

will materially affect the current schedule of contact and access with the second residential parent", eliminates any presumption that the child's primary guardian has the best interest of their child at heart. Thus, the Petitioner argues that in the absence of requiring substantial proof that the primary residential parent is no longer fit to make primary residential decisions in the best interest of their child, or that the child will suffer a sufficient degree of harm or detriment to their rights or welfare if allowed to relocate with their primary care giver, Florida's Relocation Statute in facially unconstitutional.

B. Florida's Parental Relocation Statute is Unconstitutional Because It Violates Primary Residential Parents' Right to Travel.

Restraint upon a person's "right of travel" was a well-known feature of slavery abolished by the Thirteenth Amendment. In Jones v. Helms, 452 U.S. 412, 417-18 (1981), this Honorable Court acknowledged the right of United States citizens to travel, stating, "It is, of course, well settled that the right of a United States citizen to travel from one State to another and to take up residence in the State of his choice is protected by the Federal Constitution.". See also Shapiro v. Thompson, 394 U.S. 618 (1969) (...our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which

unreasonably burden or restrict this movement.)[Emphasis Added.]

The Second District Court of Appeal's opinion in Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007) is that the Petitioner's right to travel has not been implicated, because she is not personally prevented from relocating to another state, but is only restricted from relocating to another state with the parties' children. (Appendix A, p. 10.) This opinion is not logical and avoids the very crux of the constitutional violation asserted by the Petitioner. The Petitioner, the Mother, is not free to relocate without her children while she has previously adjudicated primary physical custody of the children who are restricted from moving with her, and no alternate custodial arrangement has been determined to be more in the children's best interest than relocating with her. Thus, Florida's courts have left the Mother in "legal limbo", resulting in the violation of her constitutional right to travel.

Florida's Relocation Statute is clearly at fault, because the statute does not require the opposing parent to present and prove to the court that an alternate parenting plan is more in the best interest of the child than relocating with their already established primary residential parent when they object to the primary residential parent's relocation. Thus, by implication, any denied relocation request under Florida's relocation statute requires a parent to give up the primary custody and responsibility of their child in order to exercise

their constitutionally protected right to travel. This is clearly a penalty to that parent that demands strict scrutiny by the judiciary. In Mahmoodjanloo v. Mahmoodjanloo, 160 P.3d 951 (Okla. 2007), Opala, J., dissenting, the Oklahoma Supreme Court recognized that attempting to dispose of a relocation issue without conducting a post-denial proceeding to adjudicate the legal consequences that flow from its decision casts an impermissible burden on the primary custodial parent's adjudicated custodial interest. See Dunn v. Blumstein, 405 U.S. 330, 339 (1972)("....since the right to travel was a constitutionally protected right, 'any classification which serves to penalize the exercise of that right unless shown to be necessary to promote a compelling governmental interest, is unconstitutional'"); Jaramillo v. Jaramillo, 823 P.2d 299, 306 (N.M. 1991)(citing Shapiro v. Thompson, 394 U.S. at 631). ("[I]t makes no difference that the parent who wishes to relocate is not prohibited outright from doing so; a legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right altogether."); In re Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005) ("..though [section 14-10-129] does not prohibit outright a majority time parent from relocating, it chills the exercise of that parent's right to travel because, in seeking to relocate, that parent risks losing majority parent status with respect to the minor child."). Thus Florida's Relocation Statute is facially unconstitutional, because it

does not require a trial court to resolve the legal consequences that result from a denied relocation request.

C. Florida's Parental Relocation Statute is Unconstitutional Because It Violates the Equal Protection Clause of the Fourteenth Amendment of the United States' Constitution.

Florida's Relocation Statute violates the right to equal protection under the law guaranteed by the Fourteenth Amendment of the U.S. Constitution by creating a suspect class...primary residential parents...and discriminating against them by elevating the secondary residential parent's schedule of parenting time with their child above the primary residential parent's right to a presumption that they are acting in their child's best interest. The Second District Court of Appeal's opinion in Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007) is that this argument is without merit, because primary and secondary residential parents are not "similarly situated". (Appendix A, p. 16.) Interestingly, the Second District also believes the secondary residential parent, although not "similarly situated" as to the primary residential parent, has an equal right in determining where the children's primary residence should be, pursuant to the shared parental responsibility provision of their final judgment and marital settlement agreement. (Appendix A, p. 9.) The Second District's construction of Fla. Stat. § 61.13(2)(b)(2)(2007)

regarding shared parental responsibility and Fla. Stat. § 61.13(2)(d)(2004) regarding parental relocation effectively permits the statutes to operate as a sword and a shield for secondary residential parents. According to the District Court of Appeal of the State of Florida, Second District, a primary residential parent has no rights whatsoever in deciding where their children's primary residence will be...despite being given the court ordered title of "primary residential parent"...whereas, the secondary residential parent retains full, unscrutinized legal right to decide where their children's secondary residence will be pursuant to their court ordered title of "secondary residential parent". It cannot be both ways! Either both parent's rights and responsibilities to their children are equal and should be equally protected by the law, OR the parent's rights and responsibilities are not equal and the "primary residential" designation carries with it some measure of deference. By definition, the word "primary" means first in rank, importance, or value. One of the most significant elements of stability in a child's life is their primary caretaker--the person who cooks their meals, puts them to bed, cares for them on a daily basis, and has dedicated his/her daily life to raising them. See Kaiser v. Kaiser 23 P.3d 278, 35 (Okla. 2001);

> **"[T]he well-being of the child is fundamentally interrelated with the well-being of the custodial parent, and that parent is the best person to make decisions affecting**

> **the child and the new family group, such as where they will reside."**

See also D'Onofrio v. D'Onofrio, 365 A.2d 27, 29 (N.J. Super 1986),

> **"The custodial parent, who bears the essential burden and responsibility for the children, is clearly entitled to the same option to seek a better life for herself and the children, particularly where the exercise of that option appears to be truly advantageous to their interests and provided that the paternal interest can continue to be accommodated, even if by a different visitation arrangement than theretofore."**

However, Florida's Relocation Statute elevates the secondary residential parent's rights above the primary residential parent's rights and gives absolutely no weight to the "primary" designation and the daily responsibility that designation carries with it. This is the constitutional violation asserted by the Petitioner.

Further, the Petitioner argues that the court's authority in parental relocation matters lies only in Florida's statutory policy to assure that "each minor child has frequent and continuing contact with both parents after the marriage of the parties is dissolved", Fla. Stat. § 61.13(2)(b)(1) (2007), and that the state's interference in family matters is only constitutionally justified in protecting the best

interests of children in this regard. In *In re* Marriage of Pape, 989 P.2d 1120, 1128 (Wash.2000), the Washington Supreme Court explained:

> **"We are aware of and are sympathetic to the difficulties faced by parents whose children move, with the other parent, some distance away. However, these difficulties are a consequence of the dissolution of marriage. Once the decree of dissolution is entered, a trial court's involvement in decision-making for the family is minimized. The court's role in a family's life following dissolution of marriage is not to review every parenting decision to determine if it is in the child's "best" interests. Once the court has determined the best residential placement of the child, based on the best interests standard set forth in the statute, the important job of the court is finished. The court does not again become significantly involved in parenting decisions, unless the child's well-being is seriously threatened by parenting decisions. A change in the location of the child's place of residence, with the primary residential parent, generally does not pose such a serious threat."**

Also speaking to the necessity of judicial deference on decisions by the custodial parent as to their place of residence, the Supreme Court of Vermont stated in Lane v. Shenck, 614 A2d 786, 789 (Vt. 1992):

> **"At the time of divorce, mother was given the powers [of custody] which included the right to decide where she would reside with the children. The place of residence for a family is central to childrearing, and thus that decision is understandably entrusted to the parent awarded parental rights and responsibilities. Mother's decision as to place of residence was overruled because the court's judgment on that issue was entitled, under its view of the law, to more weight than hers. Mere disagreement, however, is not enough... The court may differ with the custodian as to the wisdom of a certain parental decision, but it may not lightly replace the judgment of the custodian with its own."**

In contrast, the Second District's opinion is that the sole purpose of Florida's Relocation Statute is to preserve the non-custodial parent's rights, rather than to preserve the rights of the children with regard to that parent. (Appendix A, p. 16.). See Planned Parenthood of Southeastern Pa. V. Casey, 505

U.S. 833, 847 (1992) (The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.) It is the Second District's statutory construction of Florida's Relocation Statute that creates the equal protection violation, where the secondary custodial parent's rights are elevated above the primary custodial parent's rights. This construction of Florida's Relocation Statute does not further the state's goal of assuring that children have frequent and continuing contact with both parents after their parents divorce by the statutory intrusion of only the primary residential parent's protected fundamental rights when the secondary residential parent maintains absolute freedom to move away from their children, regardless of the impact their choice may have on their children. Thus, Florida's Relocation Statute is facially unconstitutional.

CONCLUSION

This Honorable Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

Leslie Ann Melton

Leslie Ann Melton
f/k/a Leslie Ann Fredman

12/21/07

Date

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(2)

Supreme Court, U.S.
FILED

07-881 DEC 21 2007

OFFICE OF THE CLERK

RECORDS AND BRIEFS

No.

IN THE SUPREME COURT OF THE UNITED STATES

LESLIE ANN MELTON
f/k/a LESLIE ANN FREDMAN,
Petitioner,

and

DAVID LYNN FREDMAN
Respondant,

APPENDIX

To Petition for a Writ of Certiorari to the District Court of Appeal of the State of Florida, Second District

Leslie Ann Melton
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APPENDIX A

Decision of State District Court of Appeals

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

Case No. 2D06-1674

LESLIE ANN FREDMAN,
n/k/a LESLIE ANN MELTON,
Appellant,

v.

DAVID LYNN FREDMAN,
Appellee.
/

Opinion filed June 20, 2007.
Appeal from the Circuit Court for Hillsborough County; Monica L. Sierra, Judge.
Allison M. Perry of Law Office of Allison M. Perry, P.A., Tampa, for Appellant.
Robert M. Geller of Law Offices of Robert M. Geller and Associates, Tampa, for Appellee.

SILBERMAN, Judge.

In this post dissolution proceeding, Leslie Ann Fredman, n/k/a Leslie Ann Melton (the Mother), appeals a final order denying her supplemental petition and prohibiting her from relocating with the parties' two children

to Texas. She contends that section 61.13(2)(d), Florida Statutes (2004), the parental relocation statute,[1] is unconstitutional because it abridges her fundamental rights to privacy and travel and violates her right to equal protection of the law. She also contends that the trial court abused its discretion in denying her request to relocate to Texas. We affirm, holding that the statute is constitutional on its face and that the trial court did not abuse its discretion in denying her request to relocate.

The Mother and David Lynn Fredman (the Father) have two sons, born December 21, 1994, and December 22, 1997. The parties divorced in October of 2002, and the final judgment of dissolution of marriage incorporated the parties' marital settlement agreement (MSA). The parties have shared parental responsibility, with the Mother being the primary residential parent and the Father having liberal visitation, specifically including a minimum of one night per week and every other weekend. The MSA and the final judgment do not contain a restriction on the Mother's relocation with the children. At the time the parties entered into the MSA and

---

[1] The legislature significantly amended the parental relocation statute and moved it to section 61.13001, effective October 1, 2006. See Ch. 2006-245, §§ 2, 4, at 2017-22, Laws of Fla. The parties did not mention the new statute in their briefs, and the trial court's orders were entered prior to the amendment, pursuant to section 61.13(2)(d). Thus, this opinion does not address section 61.13001.

provided for the specific visitation, the Mother had a relationship with Mike Melton, whom she later married.

The Mother and Mr. Melton met while he was working on a project in Florida for an extended time. Mr. Melton lives in Ponder, Texas, with his son, and he now works in Ponder. The Mother works in Hillsborough County, Florida, and lives with the parties' two sons in a two-bedroom apartment in Brandon, Florida. On January 23, 2004, the Mother filed a supplemental petition seeking to modify the Father's visitation because she would be marrying Mr. Melton and relocating with the children to Mr. Melton's home in Ponder, Texas. Upon the Father's motion for injunctive relief, the court entered a temporary injunction prohibiting the Mother from moving the children to Texas.

At the final hearing in November 2004, the Mother testified to the benefits of moving the children to the small community of Ponder, Texas, particularly Mr. Melton's new 3000-square-foot home and the amenities at the nearby public school. The Mother testified that she earns $58,000 per year and has the possibility for advancement at her current Florida employment. The Mother testified that she planned to be a stay-at-home mom in Ponder, but if necessary she could find comparable employment there. The only people her children know in Ponder are Mr. Melton and his son. The Mother has no family in Ponder; her family lives in Oklahoma, two and

one half hours away from Ponder.

Mr. Melton testified that he worked in the oil and gas industry as a right-of-way agent, that he earned $70,000 to $90,000 per year, and that he could not find employment in his field of work in Florida.

The Father testified that he works a night shift from 11:00 p.m. to 7:30 a.m., that he exercised visitation with his children on Tuesdays and every other weekend, and that when he did not exercise visitation it was due to his work schedule. Since the Mother filed the supplemental petition, he has increased the overnight visitation because his new wife is home while he is working at night. The Father picks the children up from school on the days he has visitation. He testified that he helps them with their homework and that he enjoys recreational activities with his sons, including bowling and fishing.

The Father has extended family in Hillsborough County, including his mother, grandmother, uncles, aunts, and cousins. The Father testified that the children have seen their grandmother at least once a week throughout their lives. The Father sees his family every weekend, and the children have frequent contact with them, enjoying "boating, fishing, swimming, and just hanging out as a family" at their grandmother's home. The Father's family is also involved in a bowling league in which the children and the Father participate, so that the children spend time with the Father and his family on Tuesday

nights. Furthermore, the Father testified that both the Father and the Mother attend the children's bowling league on Saturdays.

On December 10, 2004, after a final hearing, the trial court rendered an order applying the factors in section 61.13(2)(d) regarding relocation and denying the Mother's request for modification of visitation. On appeal, this court reversed and remanded for the trial court to use the proper legal standard set forth in section 61.13(2)(d)(4) regarding the proposed substitute visitation for the Father. See Fredman v. Fredman, 917 So. 2d 1038 (Fla. 2d DCA 2006). On remand, the trial court reconsidered that factor, and in an order rendered March 24, 2006, found that the proposed visitation plan was "adequate to foster a continuing, meaningful relationship between the children and the Father" but found, considering all the factors, that the move was not in the children's best interest. Thus, the trial court denied the Mother's supplemental petition and her request to relocate. The Mother now appeals from the trial court's March 2006 order.

1. CONSTITUTIONALITY OF RELOCATION STATUTE

Although the Mother did not raise the constitutionality of the relocation statute in the trial court, she challenges the facial constitutionality of the statute on the ground that application of the allegedly

unconstitutional statute constitutes fundamental error which she can raise for the first time on appeal. See State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993) ("A facial challenge to a statue's constitutional validity may be raised for the first time on appeal only if the error is fundamental."); B.C. v. Dep't of Children & Families, 864 So. 2d 486, 491 (Fla. 5th DCA 2004) (recognizing that the facial unconstitutionality of a statute may be raised for the first time on appeal but that the unconstitutional application of a statute to a particular set of facts may not be raised for the first time on appeal). The constitutionality of the relocation statute appears to be a question of first impression in the State of Florida. We emphasize, however, that this opinion does not address the significantly amended version of the relocation statute in section 61.13001 but applies only to the version of the statute in section 61.13(2)(d).

Section 61.13(2)(d) provides as follows:

> No presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to remove the child and the move will materially affect the current schedule of contact and access with the secondary residential parent. In making a determination as to whether the primary residential parent may relocate with a child, the court must consider the following factors:
>
> 1. Whether the move would be likely to improve the general quality of life for

both the residential parent and the child.

2. The extent to which visitation rights have been allowed and exercised.
3. Whether the primary residential parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements.
4. Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child and the secondary residential parent.
5. Whether the cost of transportation is financially affordable by one or both parties.
6. Whether the move is in the best interests of the child.

The constitutionality of a statute is reviewed de novo; however, a legislative enactment comes to the reviewing court with a presumption of constitutionality, and the reviewing court should, if possible, construe a statute in a manner resulting in a constitutional outcome. Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005). When the legislature enacted section 61.13(2)(d), Florida Statutes, in 1997, it provided, "No presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact and access with the secondary residential parent." See Ch. 97-242, §

1, at 4436, Laws of Fla. That provision effectively overruled the Florida Supreme Court's decisions in Mize v. Mize, 621 So. 2d 417 (Fla. 1993), and Russenberger v. Russenberger, 669 So. 2d 1044 (Fla. 1996), which provided that when a primary residential parent is seeking in good faith to relocate, there is a rebuttable presumption in favor of the request to relocate. See Russenberger, 669 So. 2d at 1047. The Mother contends that this standard was one of constitutional dimension and that by removing the presumption in favor of relocation, the relocation statute "is a clear violation of numerous constitutionally protected rights." Specifically, the Mother raises the right to privacy, the right to travel, and equal protection.

Right to Privacy

The mother contends that the relocation statute violates a primary residential parent's right to privacy because it empowers the State to dictate where the primary residential parent may or may not live. See Art. I, § 23, Fla. Const. (providing "the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein"); Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998) (recognizing parent's fundamental right to privacy in childrearing decisions and holding grandparent visitation statute unconstitutional). The argument regarding her fundamental right to privacy seems to be very similar to her argument regarding her

fundamental right to travel because the privacy argument is based on her right to choose where she lives. Thus, the discussion on her right to travel will encompass her right to choose where she lives.

To the extent that the mother is arguing that she has a fundamental right as a parent to decide where her children live, she must recognize that the father shares the same fundamental right. The Von Eiff court stated that when a governmental regulation implicates a privacy interest, the State must establish "that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." 720 So. 2d at 514 (quoting Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Bus. Regulation, 477 So. 2d 544, 547 (Fla. 1985)). In Winfield, however, the Supreme Court explained that "before the right of privacy is attached and the delineated standard applied, a reasonable expectation of privacy must exist." 477 So. 2d at 547. In City of North Miami v. Kurtz, 653 So. 2d 1025, 1028 (Fla. 1995), the court stated that the Florida right to privacy "is circumscribed and limited by the circumstances in which it is asserted." The court determined that an applicant for a government job did not have a reasonable expectation of privacy in the disclosure on a job application of whether she was a smoker. Id. The court therefore determined that the circumstances did not implicate Florida's right of privacy. Id.

Unlike Von Eiff, where a parent asserted his privacy right regarding childrearing decisions against third parties (the grandparents), here, the Mother asserts her right to make childrearing decisions against the Father. The final judgment of dissolution of marriage provides that the parties have shared parental responsibility as to the children and that the Mother is the primary residential parent. As primary residential parent, the Mother does not make all childrearing decisions. Rather, section 61.046(15) defines "shared parental responsibility" as "a court-ordered relationship in which both parents retain full parental rights and responsibilities with respect to their child and in which both parents confer with each other so that major decisions affecting the welfare of the child will be determined jointly." It is obvious that what school a child attends and in what state a child lives are major decisions affecting the child's welfare. Therefore, when the parties agree to shared parental responsibility in the marital settlement agreement and a court order provides for shared parental responsibility, we conclude that the Mother does not have a reasonable expectation of privacy to decide in what state her children live, with respect to the Father, although she would have a reasonable expectation of privacy as to a third party. Thus, in this particular circumstance, the Mother's right to privacy is not implicated.

Right to Travel

The Mother contends that the relocation statute violates her fundamental right to travel by requiring her to obtain court permission to relocate to another state. The United States Supreme Court has "long 'recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." Saenz v. Roe, 526 U.S. 489, 499 (1999) (quoting Shapiro v. Thompson, 394 U.S. 618, 629 (1969), overruled in part on other grounds by Edelman v. Jordan, 415 U.S. 651 (1974)); see also State v. J.P., 907 So. 2d 1101, 1112 (Fla. 2004) ("The freedom to travel throughout the United States and the freedom of movement have been recognized as basic rights under the federal Constitution.") Here, the relocation statute does not prevent the Mother from relocating to another state, but it does restrict her in moving with the parties' children to another state. In Shapiro, the Court recognized that "[i]f a law has 'no other purpose * * * than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it (is) patently unconstitutional.'" 394 U.S. at 631 (quoting United States v. Jackson, 390 U.S. 570, 581 (1968)). In applying this concept to a relocation case, the New Mexico Supreme Court stated that "it makes no difference that the parent who wishes to relocate is not prohibited

outright from doing so; a legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right altogether." Jaramillo v. Jaramillo, 823 P.2d 299, 306 (N.M. 1991) (citing Shapiro, 394 U.S. at 631). In In re Marriage ofCiesluk, 113 P.3d 135, 142 (Colo. 2005), the Colorado Supreme Court, citing Jaramillo and Shapiro, determined that although the Colorado statute at issue "does not prohibit outright a majority time parent from relocating, it chills the exercise of that parent's right to travel because, in seeking to relocate, that parent risks losing majority parent status with respect to the minor child."

The Colorado Supreme Court in Ciesluk discussed the competing interests involved in a relocation by the "majority time parent" and the different approaches courts have taken on the subject. There, an amendment to a Colorado statute replaced a case law "presumption in favor of the majority time parent with a liberal fact-driven analysis." Id. at 141. Like the present case, the mother in Ciesluk argued that by removing the presumption in favor of relocation, the amended statute "discourages her from relocating, and unconstitutionally infringes upon her right to travel." Id. at 142. Ciesluk recognized, however, that it is not only the relocating parent's fundamental right to travel that is at stake. "In addition, a minority time parent has an equally important constitutional

right to the care and control of the child." Id. (citing Troxel v. Granville, 530 U.S. 57, 65 (2000) (reiterating the fundamental liberty interest that parents have "in the care, custody, and control of their children")). Furthermore, intertwined with the parents' competing rights is the concern for the best interests of the child. Ciesluk, 113 P.3d at 142. "Thus, relocation disputes present courts with a unique challenge: to promote the best interest of the child while affording protection equally between a majority time parent's right to travel and a minority time parent's right to parent." Id.

The Ciesluk court considered and rejected the approach by the Wyoming Supreme Court in Watt v. Watt, 971 P.2d 608 (Wyo. 1999), that a custodial parent's right to travel and to relocate the children is not to be denied unless there is a substantial and material change in circumstances and unless detriment to the child can be shown. Ciesluk, 113 P.3d at 143. We agree that this approach fails to take into consideration the other parent's fundamental right to parent, and the Florida relocation statute's fact-driven approach balances all interests, including the best interests of the child.

The Ciesluk court also considered and rejected the approach by the Minnesota court in LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000), which determined that the deprivation of the right to travel was justified by a compelling state interest: the best

interests of the child. Ciesluk, 113 P.3d at 144-45. Although this approach has some appeal because the best interests of the child generally is a paramount concern, the Florida Supreme Court has held, albeit in a different context, that the best interests of the child is not a compelling state interest. In Von Eiff, the supreme court held a grandparent visitation statute unconstitutional. 720 So. 2d at 517. The court determined that the statute infringed on the parents' right to privacy, which includes the right to make childrearing decisions. Id. at 513-14. To justify an intrusion on the right to privacy, the State had to demonstrate "that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." Id. at 514 (quoting Winfield, 477 So. 2d at 547). The court determined that the best interests of the child was not a compelling state interest; rather, " 'the State may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm.' " Id. (citation omitted). The Von Eiff court noted that it did not intend to disrupt the best interest standard in other areas of family law. Id. at 514 n.3. Of course, Von Eiff is factually distinguishable in that the father and adoptive mother's right to raise their child was pitted against the desire for visitation by third parties, the maternal grandparents. Here, the Mother and the Father have competing rights.

The Colorado court in Ciesluk placed much emphasis on these competing rights,

ng with the State's concern for the best erests of the child, and chose to adopt the w Mexico Supreme Court's approach in amillo. 113 P.3d at 146. The Jaramillo court ermined that in a joint custody situation, a ent wishing to relocate should not be dened by an adverse presumption. 823 P.2d 305. It also determined that the resisting ent should not be burdened with a sumption in the relocating parent's favor, ause the resisting parent has a fundamental erty interest in parenting. Id. at 306. Instead, court concluded that

> neither parent will have the burden to show that relocation of the child with the removing parent will be in or contrary to the child's best interests. Each party will have the burden to persuade the court that the new custody arrangement or parenting plan proposed by him or her should be adopted by the court, but that party's failure to carry this burden will only mean that the court remains free to adopt the arrangement or plan that it determines best promotes the child's interests.

at 309.

The Ciesluk court determined that in olying the Colorado statute, a court is not to ke a presumption in favor of or against ocation and that neither party has a burden proof. Rather, " 'both parents share equally

the burden of demonstrating how the child's best interest will be served.' " 113 P.3d at 147 (quoting Jaramillo, 823 P.3d at 308). The court has the duty to consider and make findings on the twenty-one factors set out in the Colorado statute, with the focus on the child's best interests. Id. At 147-48. Therefore, the Colorado court balanced the two competing fundamental rights, along with the child's best interests, and determined that if neither party had a presumption or burden of proof, the rights were appropriately balanced and the child's interests taken into account.

Here, the Florida relocation statute expressly states that there is no presumption in favor of or against relocation. Because the Father's constitutional rights must also be considered, we reject the Mother's argument that the lack of a presumption in favor of the Mother is unconstitutional. Further, section 61.13(2)(d) is silent as to the burden of proof. See Gerov v. Holter, 731 So. 2d 152, 153 (Fla. 4th DCA 1999); see also Bartolotta v. Bartolotta, 703 So. 2d 1229, 1230 n.1 (Fla. 4th DCA 1998) ("Although there is no longer any presumption favoring relocation, the burden of proof as to whether a relocation meets the statutory criteria is not addressed by the statute.") When a primary residential parent seeks to relocate a child, section 61.13(2)(d) requires the court to consider all the statutory factors without any presumptions in favor of either party. The factors address, among other things, the relocating parent's quality of life, the other

arent's ability to maintain a meaningful lationship with the child, and the child's best terests. See § 61.13(2)(d)(1), (4), (6). Thus, the location statute requires the court to nsider the competing interests, with an propriate focus on the parents' rights, along ith the best interest of the child. Therefore, e statute does not violate the Mother's right travel.

Equal Protection

The Mother contends that the relocation atute violates the Equal Protection Clause of e Fourteenth Amendment to the Constitution ecause it discriminates against primary sidential parents. She argues that primary sidential parents must obtain permission to locate, while secondary residential parents eed not obtain permission to relocate from the ea where their child resides. The Mother tes no equal protection cases in her gument. An equal protection analysis is propriate only if similarly situated dividuals are treated differently. "Equal otection is not violated merely because some ersons are treated differently than other ersons. It only requires that persons similarly tuated be treated similarly." Troy v. State, 948 . 2d 635, 645 (Fla. 2006) (quoting Duncan v. oore, 754 So. 2d 708, 712 (Fla. 2000)). In a allenge to a Nevada relocation statute on ual protection grounds, the Nevada Supreme ourt recognized that custodial and oncustodial parents are not similarly

situated. Reel v. Harrison, 60 P.3d 480, 483 (Nev. 2002). The court explained that if the noncustodial parent did not consent to the move, the Nevada statute required the custodial parent to obtain court permission to move with the child. The Nevada Supreme Court, quoting from its earlier opinion in Schwartz v. Schwartz, 812 P.2d 1268, 1270 (Nev. 1991), noted the statute's purpose was " 'to preserve the rights and familial relationship of the noncustodial parent with respect to his or her child.' " Reel, 60 P.3d at 483 (footnote omitted).

Here, the Mother, as the primary residential parent, must obtain permission to relocate with the children because relocation would affect the secondary residential parent's fundamental right to parent and would limit the Father's access to the children. However, if the Father chooses to relocate out of state, it does not deny the Mother access to her children. Thus, to the extent that a primary residential parent must seek court permission to relocate, the parties are not similarly situated; thus, the statute does not violate the Equal Protection Clause. Therefore, we conclude that the statute is constitutional on its face.

2. DENIAL OF REQUEST TO RELOCATE

The Mother contends that, in applying section 61.13(2)(d), the trial court abused its discretion in denying her relocation request on

remand following the earlier appeal. The standard of review regarding a trial court's order on relocation is abuse of discretion. Botterbusch v. Botterbusch, 851 So. 2d 903, 904 (Fla. 4th DCA 2003). Competent, substantial evidence must support the trial court's findings as to the factors in section 61.13(2)(d) that the trial court must consider in making its determination. See Berrebbi v. Clarke, 870 So. 2d 172, 173 (Fla. 2d DCA 2004); Botterbusch, 851 So. 2d at 904. Here, the record reflects competent, substantial evidence to support the trial court's findings, and we cannot say that the trial court abused its discretion in denying the Mother's request to relocate to Texas.

In this court's prior opinion in Fredman v. Fredman, 917 So. 2d 1038, 1041 (Fla. 2d DCA 2006), we reversed and remanded for the trial court to again consider the mother's proposed relocation under section 61.13(2)(d), with directions to use the proper standard as stated in section 61.13(2)(d)(4): "Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child and the secondary residential parent." In its new order, rendered on March 24, 2006, the trial court found that the Mother's proposed substitute visitation schedule "would be adequate to foster a continuing, meaningful relationship between the children and the Father." The trial court adopted the findings in its previous order rendered December 10, 2004, except paragraph 13, which had used the improper standard regarding substitute

visitation. Although the court found that the substitute visitation would be adequate, the trial court again denied the relocation request. After considering the statutory factors discussed in the 2004 order and the visitation factor that it reconsidered under the proper standard, the court concluded

> that relocation would not be in the best interest of the children, even though it may be in the best interest of the Former Wife and her new husband. The Court finds that the proposed relocation does not benefit the children inasmuch as there has not been a showing that the proposed relocation would improve the children's school, family or even home life. See Berrebbi v. Clarke, 870 So. 2d 172, 173 (Fla. 2d DCA 2004).

In its findings, the court recognized that the family would live in a 3000-square-foot home in Texas and that the Mother currently lives in a two-bedroom apartment in Hillsborough County. On cross-examination, however, the Mother admitted that one could find a house in Hillsborough County, Florida, at a cost comparable to the cost of the home in Ponder. The Father also testified that there were homes available in his community in Brandon at a cost comparable to Mr. Melton's home in Ponder.

With respect to schooling, the court found that although the Mother contended that the children would be in a better school in

Texas, the Father testified that comparable public schools are available in Hillsborough and that the children were doing well in their present school. The Mother had testified to all the facilities that the children's small private school in Brandon did not have, but she admitted on cross examination that good public schools were available in Hillsborough County.

With respect to family life, the court recognized both parents' involvement with the children's sport activities. However, the court emphasized that the Father is actively involved with the children and that he and the children share a "passion for bowling." The court also recognized that the children have frequent contact with the Father's relatives in Hillsborough County, including the Father's mother, grandmother, uncles, aunts, and cousins. The Mother has no family in Texas, and the court noted that Mr. Melton's extended family does not reside in Ponder, Texas. In fact, it appears that the children know no one in Ponder other than their stepfather and stepbrother. This is in stark contrast to the excellent relationship that the children have with the Father's family in Hillsborough County.

The trial court recognized that the move would improve the home life for the Mother and her new husband. However, in Berrebbi, this court reversed an order that allowed relocation, stating that "[a]ny evidence regarding the benefits of relocation related to

the Mother and her new husband" and that there was no evidence that relocation would be good for the child. 870 So. 2d at 173. Here, the Mother believed that relocation would provide certain benefits for the children. However, the Father presented contrary evidence, as well as evidence reflecting that the children's best interests would be served by allowing them to remain in Hillsborough County. Based on this record, we cannot say that the trial court abused its discretion in denying the Mother's request to relocate with the children to Texas.

Affirmed.

WHATLEY and KELLY, JJ., Concur.

APPENDIX B

Decision of State Trial Court

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, N AND FOR HILLSBOROUGH COUNTY, FLORIDA

Case No.: 02-12576
Division: C

LESLIE ANN FREDMAN
Petitioner,

and

DAVID LYNN FREDMAN,
Respondent.
/

ORDER

This cause came before this Court on a ner Wife's Supplemental Petition for ification and Former Husband's plemental Petition heard on November 22 23, 2004. Present for the hearing was the ner Wife, her attorney, the Former band and his attorney. The Court, having ewed the file, heard the testimony ented, and being otherwise fully advised, es these findings of fact and reaches these clusions of law:

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CTION I. FINDINGS

The Court has jurisdiction over the subject matter and the parties, and the minor children of the parties, Joshua Lynn Fredman, born December 21, 1994, and Jared Lee Fredman, born December 22, 1997.

The last order establishing parental responsibility and visitation was entered on October 14. 2002, which ratified Marital Settlement Agreement dated July 29, 2004.

Section III, Paragraph 4 of the Marital Settlement Agreement provided for the Father to have "possession of the child(ren) at any and all times mutually agreed to by the Mother in advance, and in the absence of mutual agreement, shall have possession of the child(ren) under the specified terms set out below:

Regularly Scheduled Visition: Liberal visitation to include a minimum of one day/night per week and every other weekend from 7:00 p.m. Friday until 7:00 p.m. Sunday.

Holidays/Vacations:
Christmas/Even years - From 7:00 p.m. Christmas Eve day until 1:00 p.m. Christmas Day.
Christmas/Odd years - From 1:00 p.m. Christmas Day until 7:00 p.m. Christmas Day.

New Year's Eve - Odd years from 7:00 p.m. New Year's Eve until 7:00 p.m. on said day.
Thanksgiving Day - Odd years from 7:00 p.m. the night before until 7:00 p.m. on said day,
Spring Break - Even years.
Father's Day - If not on a regularly scheduled weekend visit, then from 9:00 a.m. until 7:00 p.m. on said day.
Labor Day - Odd years, from 7:00 p.m. Friday night to 7:00 p.m. Monday night.
Memorial Day - Even years, from 7:00 p.m. Friday night to 7:00 p.m. Monday night.
Independence Day - Odd years if not on a regularly scheduled weekend visit, then from 7:00 p.m. the night before until 7:00 p.m. on said day.
Summer - Two consecutive weeks (14-days) of the father's choice during summer break from school.

4. **The Mother filed a Verified Supplemental Petition to Modify Visitation, Child Support and Other Relief on January 23, 2004, alleging at Paragraph Three "[t]he substantial change is that the Former Wife will be getting married and relocating with the children to the state of Texas." The Mother seeks to modify the visitation to allow the Father to have eight weeks summer visitation, alternating holidays, one telephone call per week, as well as liberal visitation between the Father and the children if the Father travel to Texas.**

5. **The Father filed a Verified Emergency**

Motion for Injunctive Relief on March 4, 2004, requesting the Mother be enjoined from relocating with the minor children until the final hearing on the supplemental petition.

The Court entered a temporary injunction after hearing on March 5, 2004 restricting the permanent relocation of the children from the State of Florida until further order of court. This order was not appealed and governs the parties.

The Mother has argued that the Court does not have jurisdiction to consider the issue of relocation because the Father failed to file a supplemental petition raising the issue of a geographical restriction on the permanent residence of the minor children and no restriction was contained in the Final Judgment.

The Court found that it has jurisdiction to consider the issue of relocation. The Mother inherently raised the issue of relocation in her Supplemental Petition by alleging the basis of the substantial change in circumstances to include relocating with the children to the state of Texas. Additionally, the Father raised relocation as an issue in the Verified Motion for Temporary Injunction, which is the basis for the Order dated March 5, 2004 which restricts relocation and currently governs the parties.

9. In addition to considering the credibility of the witnesses, the Court considered the factors of Florida Statute Section 61.13(2)(d) to determine whether the Mother may relocate the minor children to the State of Texas.

10. Whether the move would be likely to improve the general quality of life for both the Mother and the minor children.

    a. The Mother remarried her current husband after the date of filing the supplemental petition. The Mother and her new husband have built a three thousand square foot home in Ponder, Texas that was finished in August of 2004.

    b. The Mother is currently working in Hillsborough County, Florida as a business process analyst at MP Total Care, Inc. earning approximately $58,000.00 per year. The Mother testified that there is room for advancement at her employment due to the company's growth. However, she would like to relocate to Texas where her new husband resides, where she can be a stay-at-home mom.

    c. Mike Melton, the Mother's current husband, testified that he met the Mother while he was working in the State of Florida under a contracting position. He was residing in a single family home in Hillsborough County at the time. Mr.

Melton is currently employed as a right-of-way agent in the field of oil and gas and currently earns $70,000.00 to $90,000.00 per year. Mr. Melton indicated that he inquired in the State of Florida for a comparable position as a right-of-way agent in oil and gas, but no positions were available. He made no other inquiry for employment in the State of Florida.

d. The Mother and the minor children moved into an apartment at the time of separation from the Father in July of 2002 and currently reside in an apartment. The Mother argued that the quality of life for her and her children will improve with the move to Texas because they will be living in a home, rather than an apartment, living in a small rural community and the cost of living is lower. However, little data was provided on the actual cost of living in Ponder, Texas compared to the cost of living in Hillsborough County, Florida. For example, no evidence was provided to indicate Mr. Melton and the mother cannot afford to live in a single family home in Hillsborough County or that no single family homes are available in Hillsborough County.

e. The Mother argued that the children will be in a better school in Texas, however, testimony was offered by the Father that the children are doing well in their

present school and comparable public schools are available in Hillsborough County, Florida.

f. All of the Father's relatives, including his mother, grandmother, uncles, aunts and cousins, reside in Hillsborough County and the children have frequent and continued contact with these extended family members. The Mother has no relatives in the State of Texas, other than Mr. Melton's family, who do not reside in Ponder, Texas.

g. The Court concludes that the general quality of life for the Mother and the childrer would be substantially the same in Ponder, Texas as in Hillsborough County, Florida.

11. The extent to which the visitation rights have been allowed and exercised. It was the undisputed testimony that the only time that Father has failed to exercise visitation with the children was if he was unable to get off of work. Both parents are involved in the children's weekend sporting activities and both attend the children's sporting events. Similarly, the Father and the children share a passion for bowling and jointly participate in bowling every Tuesday. Both parties testified that they had no difficulty coordinating visitation until the filing of the Supplemental Petition in January of 2004. After the filing of the petition, the co-

parenting appears to have become strained, such that the Mother has not allowed the Father additionally requested visitation and the Father has begun using all three days of the alternating weekends and leaving.the children with his fiance/wife on the days that he works.

Clearly, some tension exists between the Father and Mr. Melton, which may cause difficulty in co-parenting between the Mother and the Father.

12. Whether the Mother, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements. No evidence was presented to indicate that the Mother would not comply with any substitute visitation arrangements.

13. Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the children and the Father. The Court finds this Father to be intimately involved with his children, as evidenced by the weekly contact every Tuesday evening, when he takes the children bowling. Additionally, anytime that the Father is not working on a weekend, he attends the sporting activities of the children, even if it is not his weekend to care for the children. The substitute visitation offered by the Mother will be inadequate to foster a continuing meaningful relationship at the same level

that currently exists between the Father and the minor children.

14. Whether the cost of transportation is financially affordable by one or both parties. The Mother has offered to pay the cost of transportation of the children to Florida for the visits outlined in paragraph four, above. However, the Father would need to pay the cost of any additional visitation in Texas, which appears to be economically unfeasible.

15. Whether the move is in the best interests of the children. The Court concludes that the move will not be in the best interest of the children.

16. Furthermore, the Court considered that the Mother has been romantically involved with her current husband, Mike Melton, since Easter of 2001, through the date of this hearing. It appears that both parties knew of this romantic interest, as well as the fact that Mr. Melton resided outside of the State of Florida, at the time of signing the Marital Settlement Agreement and at the time of entry of the Final Judgment. The parties, however, agreed to a specific schedule of visitation as outlined in the Marital Settlement Agreement. The Mother's move to Texas would certainly impede the parties ability to implement the parenting plan designed in the Marital Settlement Agreement.

17. The Court does not find a substantial change in circumstances and therefore, denies the Mother's Supplemental Petition for Modification.

18. Insufficient evidence of substantial change in circumstances was presented by the Father therefore, his Supplemental Petition for Modification is denied.

SECTION II. OTHER

1. The Court reserves jurisdiction to modify and enforce the Final Judgment.

2. The provisions of all final judgments or orders in effect remain the same.

ORDERED on December 9, 2004.

s/Monica L. Sierra
CIRCUIT JUDGE

COPIES TO:

Juliann Karenko, Esq.
Robert M. Geller, Esq.

APPENDIX C

Decision of State Trial Court on Remand

ORDER DENYING FORMER WIFE'S SUPPLEMENTAL PETITION TO RELOCATE

This cause came to be considered on March 23, 2006, on mandate fitftn the Second District Court of Appeals, dated January 27, 2006, which required this Court to reconsider the Former Wife's Supplemental Petition seeking to relocate with the minor children to the State of Texas, applying the proper standard under Florida Statute 61.13(2)(d)(4). After considering the record, this Court's Order of December 9, 2004, the Mandate issued by the Second District Court of Appeals, written argument presented by counsel, and being otherwise fully informed in the premises, hereby makes the following findings of fact and conclusions of law:

1. **On November 22 and 23, 2004, the Court heard Former Wife's Supplemental Petition for Modification, as well as the Former Husband's Supplemental Petition for Modification, of the Final Judgment of Dissolution of Marriage, dated October 14, 2002.**

2. **The Court issued an Order on December 9, 2004 denying both parties' supplemental petitions.**

3. On January 27, 2006, the Second District Court of Appeals found that the Court, in applying the factors of Florida Statute 61.13(2)(d) to determine whether the Former Wife's request for permission to relocate should be granted, misapplied the standard under Florida Statute 61.13(2)(d)(4). Specifically, the Court improperly measured the substitute visitation schedule against the visitation schedule provided in the Final Judgment.

4. The Second District Court of Appeals mandated the Court to reconsider the Petition using the proper standard of whether the substitute visitation schedule will be "adequate to foster a continuing, meaningful relationship between the child and the secondary residential parent."

5. The Court adopts all of the findings, except Paragraph 13, of the Order entered on December 9, 2004.

6. The Former Wife's proposed substitute visitation schedule provides for the Former Husband to have contact with the children during eight weeks of each summer, alternating holidays, any other time the Former Husband travels to Texas, and at least one phone call each week. The Former Wife offered to pay for the children's transportation costs for travel from Texas to Florida for Summer Visitation and Alternating Holidays; however, the Former

Husband would be responsible for his any visitation he enjoyed in Texas. Relying on Wilson v. Wilson 827 So.2d 401, 402 (Fla. 2nd DCA 2002) and Wiley v. Wiley 683 So. 2d 647, 650 (Fla. 4th DCA 1996), the Court finds that the substitute visitation proposed by the Former Wife would be adequate to foster a continuing, meaningful relationship between the children and the Father.

7. However, after considering the factors previously enumerated in the Order dated December 9, 2004, and after considering the factors of Paragraph Six above, the Court concludes that relocation would not be in the best interest of the children, even though it may be in the best interest of the Former Wife and her new husband. The Court finds that the proposed relocation does not benefit the children inasmuch as there has not been a showing that the proposed relocation would improve the children's school, family or even home life. See Berrebbi v. Clarke 870 So. 2d 172, 173 (Fla. 2d DCA 2004).

It is therefore, ORDERED AND ADJUDGED: The Former Wife's Supplemental Petition for Modification of the Final Judgment of October 14, 2002 is hereby DENIED.

DONE AND ORDERED in chambers in Tampa, Hillsborough County, Florida, on this 23rd day of March, 2006.

Monica L. Sierra
RCUIT JUDGE

OPIES TO:
onald Reed, Esq.
obert M. Geller, Esq.

APPENDIX D

Decision of State Supreme Court Denying Review and Denying Motion for Rehearing

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SUPREME COURT OF FLORIDA

MONDAY, OCTOBER 8, 2007

CASE NO.: SC07-1360
Lower Tribunal No(s).: 2D06-1674

LESLIE ANN FREDMAN
N/K/A LESLIE ANN MELTON,
Petitioner(s)

vs.

DAVID LYNN FREDMAN,
Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, and BELL, JJ. concur.

A True Copy
Test:

s/Thomas D. Hall
Clerk, Supreme Court

bm
Served:
ALLISON M. PERRY
ROBERT M. GELLER
HON. JAMES BIRKHOLD, CLERK
HON. PAT FRANK, CLERK
HON. MONICA LYNN SIERRA, JUDGE

APPENDIX E

Fla. Stat. § 61.13(2)(d), (2004)

Fla. Stat. § 61.13(2)(d), (2004)

(d) No presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact and access with the secondary residential parent. In making a determination as to whether the primary residential parent may relocate with a child, the court must consider the following factors:

1. Whether the move would be likely to improve the general quality of life for both the residential parent and the child.

2. The extent to which visitation rights have been allowed and exercised.

3. Whether the primary residential parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements.

4. Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child and the secondary residential parent.

5. Whether the cost of transportation is financially affordable by one or both parties.

6. Whether the move is in the best interests of the child.

APPENDIX F

Fla. Stat. § 61.13001(7) & (8), (2006)

Fla. Stat. § 61.13001(7) & (8), (2006)

Parental relocation with a child.—

(7) NO PRESUMPTION; FACTORS TO DETERMINE CONTESTED RELOCATION.--No presumption shall arise in favor of or against a request to relocate with the child when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact, access, and time-sharing with the non-relocating parent or other person. In reaching its decision regarding a proposed temporary or permanent relocation, the court shall evaluate all of the following factors:

(a) The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate with the child and with the non-relocating parent, other persons, siblings, half-siblings, and other significant persons in the child's life.

(b) The age and developmental stage of the child, the needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional

development, taking into consideration any special needs of the child.

(c) The feasibility of preserving the relationship between the non-relocating parent or other person and the child through substitute arrangements that take into consideration the logistics of contact, access, visitation, and time-sharing, as well as the financial circumstances of the parties; whether those factors are sufficient to foster a continuing meaningful relationship between the child and the non-relocating parent or other person; and the likelihood of compliance with the substitute arrangements by the relocating parent once he or she is out of the jurisdiction of the court.

(d) The child's preference, taking into consideration the age and maturity of the child.

(e) Whether the relocation will enhance the general quality of life for both the parent seeking the relocation and the child, including, but not limited to, financial or emotional benefits or educational opportunities.

(f) The reasons of each parent or other

person for seeking or opposing the relocation.

(g) The current employment and economic circumstances of each parent or other person and whether or not the proposed relocation is necessary to improve the economic circumstances of the parent or other person seeking relocation of the child.

(h) That the relocation is sought in good faith and the extent to which the objecting parent has fulfilled his or her financial obligations to the parent or other person seeking relocation, including child support, spousal support, and marital property and marital debt obligations.

(i) The career and other opportunities available to the objecting parent or objecting other person if the relocation occurs.

(j) A history of substance abuse or domestic violence as defined in s. 741.28 or which meets the criteria of s. 39.806(1)(d) by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.

(k) Any other factor affecting the best

interest of the child or as set forth in s. 61.13.

(8) **BURDEN OF PROOF.**--The parent or other person wishing to relocate has the burden of proof if an objection is filed and must then initiate a proceeding seeking court permission for relocation. The initial burden is on the parent or person wishing to relocate to prove by a preponderance of the evidence that relocation is in the best interest of the child. If that burden of proof is met, the burden shifts to the non-relocating parent or other person to show by a preponderance of the evidence that the proposed relocation is not in the best interest of the child.